Collegiality: A Judicial Discipline

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In entering upon the vocation of appellate judge, one is unwittingly submitting himself to a human relationship that will profoundly affect, for better or worse, both his work and life as a judge. It is a professional relationship significantly different from anything you have encountered in your careers up to this point, varied as they have been. Yet little can be found in print on the subject. I speak of collegiality. In such a classic as Llewellyn's "Common Law Tradition: Deciding Appeals", or Cardozo's "Nature of the Judicial Process", or so far as I know, other books on the functioning of appellate courts, the word "collegiality" will not be found in the index. You will search some dictionaries in vain for a meaning that is transferable to courts. Yet it is an unarticulated premise undergirding the whole rationale of a multi-judge appellate court.

In "Ways of a Judge" I wrote:

> "Every important appellate court decision is made by a group of equals. This fact reflects the shrewd judgment of the architects of our state and federal judicial systems that an appellate judge is no wiser than a trial judge. His only claim to superior judgment lies in numbers; three, five, seven, or nine heads are usually better than one.
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> "This element of collegiality is not unique. As the very word implies, the governance of colleges and universities relies heavily on faculties. Boards of directors, committees, commissions, and legislative bodies act collegially. But there are differences. An appellate court is a small 'college.' The members may differ in seniority, but each holds rank equal to the others. Most important, almost everything an appellate judge is called on to do he must do with his colleagues. He does not practice a specialty in his own chambers, joining his peers only to make top policy decisions. Virtually all decisions are made by a panel of at least three." (p. 58)

In that book I recognized in a footnote that my portrayal of the workings of collegiality was inescapably colored by my happy experience on the First Circuit, which had been a three judge court for 90 years. One judge who reviewed my book opined that I was revealing an "optimism approaching innocence". In the past two years we have doubled in size, with a fourth judge of our own and with normally two visitors helping us at every sitting. We have emerged from our Age of Innocence. What seemed to me as the natural order of life on an appellate bench now seems to me not so much natural as the result of a combination of self conscious awareness and willed responses. Collegiality no longer appears to me as having the spontaneity of a love affair; it rather requires the knowledge of self, the sensitivity to others, the conscious planning, the restraint, and disciplined acts that go to make up a durable marriage. When I suggested this analogy to my wife, she pointed out one significant difference: we judges do not even choose our colleagues in the first place. All the more importance attaches to the discipline.

Collegiality -- the fruitful, voluntary melding of several talents to create a superior

product -- is threatened by several factors that increasingly characterize appellate courts. The first is, as I hinted, the increasing numbers of judges; when one judge sits with another on, say, two or three panels a year rather than ten, the soil for cultivating mutual respect and intimacy is thin. A second factor is the necessarily large role played by from two to three law clerks in each chamber. A modern appellate judge's chamber has been described as a small law firm. The threat to collegiality arises when the several chambers of the judges on a court begin to act like a cluster of independent, competitive law firms, each wishing to protect its own turf, to preserve and obtain credit for its contribution, to score points at the expense of the other. The final contemporary threat to collegiality is simply the alarming volume and pace of work of all appellate courts.

Does this mean that we should view collegiality as a luxury we can no longer afford? If so, we would be settling for a quality of appellate decision making that would be confined to a head count after oral argument, with no subsequent cross-fertilization on outcome and none at all on tone, approach, dicta, remedy. A look at cases I have participated in over the past couple of years reveals to me what we would have lost, had we not worked at collegiality.

-- In an appeal from dismissal of a complaint having all the earmarks of vexatious frivolity, a colleague pointed out to me one cause of action among many that, when one focused on it, was indisputably stated. If my colleague had treated my opinion as wholly my business, we would have been wrong. If he had treated his point as wholly his, we would have had a vulnerable majority opinion and a strong dissent.

-- In a major case, I wrote an opinion just as colleague A and I tentatively agreed. [A, however, having read a Supreme Court case more carefully than I, caused me to reshape rather substantially my statement of law.] When colleague B's dissent came in, he made much of some hitherto ignored summary dismissals by the Court. This sent me back to the books. I found I could not distinguish those cases. If there had not been what I call a fructifying mutation, we would have had an unsound majority opinion and a correct though underdeveloped dissent; as it happened, we wound up with a powerful unanimous opinion, coming out the opposite way from our conference after argument.

-- In one Fourth Amendment case, my file contains no fewer than 40 pages of memos among the panel members. In the course of our marathon deliberations by correspondence, I, the writer, changed my mind about the right of the government to raise a new point on appeal and accepted the reasoning of a colleague. We wound up with my opinion, a dissent gently put, and a concurrence specifically addressing the dissent. On a motion for en banc review, a judge who had not been on the panel deferred to us because of the obviously thorough consideration we had given all arguments. Without the give-and-take which was reflected in the opinions, we would have had a perfunctory, procedurally erroneous majority opinion, a strident dissent, and possibly an en banc proceeding.

-- In another appeal, an uncomplicated criminal case, the oral argument succeeded in changing our minds from a tentative affirmance to reversal. My colleague, the writing judge, wrote a fine opinion showing why the law compelled us to reverse. However, so persuaded was he that he castigated the trial judge rather forcefully. When one of his brethren tactfully pointed out that, after all, we would have probably acted the same way and that only the luxury of hindsight and a strong post hoc oral argument made us see the implications that led us to say this was error. He reacted with the following memo:

"You are absolutely correct about the excessive tone of this

opinion. When I swung myself over, I thoughtlessly swung too far.

"Reminds me of the judge who was asked how he was getting along on a case, and who said he'd not been able to make up his mind, but when he did he was going to feel very strongly."

-- We have several cases a year where the product of the writing judge runs into such flak that the contributions of another colleague finally point to the wisdom of his writing the opinion. The transfer of writing credit has always been most gracefully made. If this had not been so, we would have had a maladroit and reluctant opinion for the court, recalling the nostrum that a camel is a horse made by a committee. To let someone else do a final draft after you have spent long hours on your own is a rigorous test of collegiality.

-- All of these are instances of collegiality being brought to bear after circulation of a draft opinion. Let me share one recent experience of collegiality at conference. At the end of a day's arguments, the panel gathered to discuss some six cases. The first two appeals were far from earth shaking. One was a commercial contract dispute; the other involved the internal affairs of some labor unions. But we spent perhaps an hour or more in discussion, in both cases gradually working toward approaches that were not only absent from the briefs and arguments of counsel but had not been in our minds until after the give-and-take of our discussion gradually identified the basic problems and approaches which might best reflect precedent, yet permit an equitable result. One of our panel was a visiting judge. It had been he who had come up with a brilliant resolution in our second case after some 40 minutes of orally shared pondering and frustration on the part of all of us. He expressed appreciation for this kind of leisurely probing, contrasting it with the conferences he had known wherein judges would simply announce seriatim their vote with perhaps a sentence of explanation. Of course many appeals can be so disposed of, but I can remember no day's cluster of cases where there was not at least one case meriting relaxed discussion and testing of possible avenues, dead ends though they might prove to be.

The essence of positive collegiality -- as distinguished from its passive or perfunctory variety, the maximizing of fruitful and happy collaboration -- as distinguished from minimizing friction, is a professional analogue of the Golden Rule: act toward your colleagues as you wish they would act toward you. After all, the most immediate, knowledgeable, interested and qualified audience that an appellate judge has is his colleagues on his own court. If this audience doesn't give discriminating feedback, by way of praise as well as criticism, there is none other half so meaningful. Let me illustrate how this Rule applies:

-- Although you may not be a former A.B.A. President or author of a hundred law journal articles, you want to be valued for your strengths. So -- make an effort to recognize and value the strengths of your peers. One judge may shine in scintillating analysis and articulate questioning at oral argument. Another may prepare cases prodigiously and spotlight weaknesses not apparent from the briefs. One may have a reliable reservoir of common sense. One may show his strength best in his painstaking commentaries on opinion drafts. One may have a graceful facility in suggesting ways to compose differences. Sometimes a judge, just by his character as reflected in his personality, may change the whole atmosphere of a collaborative effort. The point is that each of these qualities is important and each should be valued and the possessor of each

should know it is valued.

-- If you have an idea about a case, but have not fully thought it out or polished it, you bristle, feel badly, and harbor resentment when a colleague dismisses it out of hand. Collegiality is nourished on a certain amount of time. Think twice before you react quickly and strongly. There is no greater insurance against ill advised and premature differences than to try to put your criticism in writing and offer a better alternative. I confess that I tremble a bit at the prospects of all of us being able to shoot opinions into each other's chambers hot off the word processing-electronic mail assembly line. I do not look forward, except in real emergencies, to being expected to reply within the hour.

-- Although collegiality thrives on being given some time for mature reactions, there can be too much of a good thing. You like to hear from your colleagues before what you have written completely escapes your mind. Moral: give priority to responding to your colleagues' drafts.

-- In oral discussions, even a testy "Let me finish" from a colleague puts you on edge. [When a colleague tries to diminish your argument with an ad hominem reference to your former politics, associates, or activities, you chafe. So do you when your colleague professes a superior expertise because of his experience as a lawyer, as a trial judge, or professor. These are all put-downs, sand in the gears of collegiality.] Equally gravelly are words like "reactionary", "knee jerk", "boorish", "callous". Avoid them like the plague. [And, after a decent interval, don't be ashamed to recognize that little is accomplished by prolonging an oral discussion when it becomes obvious that all views have been ventilated and that, for the present, none are likely to change. Instead put your faith in the wonders sometimes worked by the passage of a little time, added perhaps by a thoughtful written memo.]

-- In exchanging memoranda, you take umbrage when a colleague's memo begins, "I am sorry to say that I disagree. I enclose a draft dissent." He hasn't given you a chance to see if he misunderstands you or if what troubles him can be taken care of by a change in your draft. Just as you hate to have your ideas dismissed out of hand so do you dislike having the door to accommodation closed shut. The lesson is that, unless you are dead sure that you and your colleagues are in basic disagreement, frame your objections tentatively, perhaps even as queries. The chances are that you will persuade the writer or your third colleague, that they will persuade you, or that an issue can be avoided by a redraft.

Because of the value I assign to the tentative reply, I have some reservations about confining oneself to the forms that some circuits use, where, by checking a box, you presumably communicate your response with a minimum of effort. In general I hate all forms. I fear that I would make my own box at the bottom of the form which would say, "See attached memorandum."

Here is a memorandum from a colleague, that, to me, encapsulates the joy of working in a collegial court:

> "I received your devastating critique on Saturday morning and assuming (as it turned out correctly) that [colleague B] would come to the same conclusion, I spent a portion of the weekend rewriting the opinion. I expect to have it in the mail within a day or so."

-- You devoutly wish that your colleagues wouldn't endorse and send on all of the Blue Book's esoterica collected by your conscientious law clerk. If you have decided to

split an infinitive or end a sentence with a preposition, you rather resent being held to secondary school grammar. You also wish that colleagues would listen, really listen, or read, really read, what you have to say, make concessions, accept or at least deal with your substantive suggestions. Again, the prescription is: set an example, go thou and do likewise. I know of no more powerful impulse toward collegiality than the examples of some of my colleagues who change their views after reflection, or have fought and lost on an issue which recurs from time to time, yet gracefully accept the stare decisis effect of the decision and do not try to undercut it.

-- Finally, you are human enough to like to be told when you have done a particularly good job, as when you have found a precedent not contained in the briefs, when your reading of the record sheds new light on a case, when you have come up with a clinching argument. Go thou . . . . You wouldn't like it if one colleague discussed you with another in deprecating terms. So don't even start this practice. You are pleased if your colleague calls you on something other than strictly business -- if the call is to wish you a happy birthday or to ask your advice on a matter of judicial ethics. I know of one older judge who is making a quiet but profound contribution to his court by just keeping in touch with all its members, particularly the newer ones.

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What is the purpose of this combination of attitude, habits, and practices that we call collegiality? Is it to achieve a maximizing of unanimous decisions, a minimizing of separate opinions? Although I think one measure of a truly collegial court does lie in avoiding unnecessary dissents and concurrences, such is a byproduct, not an objective, of collegiality. Collegiality insures that opinions for the court, whether unanimous or not, are the soundest, most balanced, and sensitive that several minds can create. It insures that separate opinions are written only because, after exploration, there remain significant differences of views that deserve to be recorded. Most important, collegiality insures that, even though judges may strongly disagree on the most basic issues, they still relish and cherish the company of their colleagues and look forward to sitting together on another case. In short, positive collegiality is the soil from which springs much of the joy in being an appellate judge. But for the soil to yield its fruit, it needs cultivation.